



BUREAU OF POLICE



Richard C. David, Mayor

Joseph T. Zikuski, Chief of Police

July 7, 2020

VIA EMAIL

Beryl Lipton
Muckrock
411A Highland Ave MR95761
Somerville, Massachusetts
02144

Re: 6/29/20 FOIL Request

Dear Beryl Lipton:

The City is in receipt of your FOIL request, received June 29, 2020, which requested the following:

“All materials and records describing and sufficient to show/disclose all allegations of misconduct made and all disciplinary proceedings taken against any officer, employee, or representative of this policing agency.”; and

“[A]ny information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.” Records kept in a digital or electronic form are also records, would be responsive to this request, and should be provided.”; and

“[I]ncluding, but not limited to, [] Investigative records and disciplinary proceedings, including but not limited to statement of charge, transcript of hearing, notice of decision, letter of termination or resignation, letter of reinstatement, record of appeal procedure, and correspondence. [] [T]his request and materials responsive to it include *all* records held in the possession of any office or individual employed or formerly employed by this policing agency, including those kept off-site, in digital form, and in personnel files.”; and

“Materials responsive to this request include — but are not limited to — all complaints, reports, records of discipline and penalties, aggregate collections of complaint and disciplinary materials (spreadsheets, databases), investigatory materials, relevant related correspondence, photographs, video, other related evidence, proof of discipline or fulfillment of penalties, and all personnel materials (including those used in promotion, contract, and other employment negotiations and considerations) that reference or utilize misconduct allegations or disciplinary materials of any sort.”; and

“Materials responsive to this request include all complaints— internal, external, and civilian — and include records disclosing the names, badge numbers, and personnel identification of each officer involved and/or serving as a witness, as well as all available details of the incident/complaint: date, time, location, nature of the incident, description of the incident, nature of the investigation, investigatory materials, the disposition of the



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case, and any subsequent materials related to the execution of any resultant discipline. Responsive materials include all complaints and allegations against any officer, employee, or representative of this policing agency, regardless of whether that complaint or allegation resulted in any investigation or disciplinary action.”; and

“Responsive materials also include all records of use of force by officers, including records disclosing the names, badge numbers, and personnel identification of each officer involved and/or serving as a witness, as well as all available details of the incident: date, time, location, nature of the incident, description of the incident, nature of the use of force, subsequent investigatory materials related to the use of force, the disposition of any investigation into the incident, and any subsequent materials related to the use of force.”; and

“[M]aterials created during the following timeframes: January 1, 2010 - June 15, 2020; January 1, 2000 - January 1, 2010; January 1, 1990 - January 1, 2000; January 1, 1980 - January 1, 1990; [and] January 1, 1970 - January 1, 1980[.]”

Determination: Denied in Part. Granted in Part.

A. Request(s) Denied

Your request, other than your sub-request for use of force records, is denied on the basis that it does not reasonably describe the documents sought.

As you are probably aware, the title of the Freedom of Information Law is misleading, the law only requires the production of existing “records” and is not a means of requesting “information.” Public Officer Law § 89(3) states in part, “Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity.” Section 89(3) then sites specific exceptions to the record creation rule; however, none of those exceptions are applicable to your requests. However, when such information is contained in a database that can readily be queried, an entity must do so.

The request lacks any terms specific enough to allow responsive records to be found with reasonable effort nor does it describe the records sought with sufficient particularity for the City to determine what documents you seek. See FOIL Advisory Opinions #15751 (<https://docs.dos.ny.gov/coog/ftext/fl15751.htm>) and #18949 (<https://docs.dos.ny.gov/coog/ftext/2013/18949.html>) and #18971 at the Committee on Open Government’s website <https://www.dos.ny.gov/coog/>.

For example, first, any “representative” is not sufficiently specific or clear to enable a search for responsive records.

Second, the phrasing is of your request (ie. “all materials and records”) is ambiguous and makes it difficult if not impossible for the City to know what records you are seeking.



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Third, “relevant related correspondence” does not reasonably describe such records and the City would be engaging in a subjective analysis to determine what correspondence is “related.”

Fourth, “reference or utilize” allegations or materials “of any sort” also begets a subjective analysis, which renders the request overly broad, requiring more than reasonable effort to locate responsive documents, and would require review of all officer personnel files over the course of 50 years to determine if any documents in those files are responsive to your request, compelling the City to find the proverbial “needle in a haystack.”

Fifth, the City notes that the Committee on Open Government has taken the position that the release or disclosure of unsubstantiated complaints against any City employee would constitute an unwarranted invasion of personal privacy. While Department Heads or Appointees may be seen to be public figures, and may give rise to issues of public concern, the City also has a duty to protect employee privacy.

Sixth, similarly, please note that in the event that you narrow your request in time frame, rank, officer name, type of force, type of misconduct, type of complaint, etc., such a narrowed request will still necessarily involve a review of records to determine outcome, privacy of the complainant or witnesses, and employee privacy.

Seventh, while the request does contain a time frame (ex. All records from 1970 -2020), it is not “reasonably described” because a request for records of all complaints and any investigations over a 50 year period pertaining to thousands of police officers cannot be compiled with reasonable effort, without the provision of narrowing search terms (ex. type of misconduct, resulting in termination, rank, still employed etc.). Please feel free to submit a revised FOIL request reasonably describing the records you seek.

Please be aware that employee records, including police disciplinary records, are still subject to the generally applicable FOIL disclosure exceptions. For instance, Sections 87(2)(b) and 89(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute “an unwarranted invasion of personal privacy.” Also Section 87(2)(g), allows the withholding of records that “are inter-agency or intra-agency materials” that are not “statistical or factual tabulations or data,” “instructions to staff that affect the public,” “final agency policy or determinations” and/or “external audits.” This rule is designed to encourage debate, discussion and a healthy deliberative decision making process by protecting initial thoughts, losing arguments or opinions from disclosure. These are but two examples of the disclosure exemptions afforded to all employee records under the Public Officers Law. In addition, the recent amendment added additional items which may be withheld or redacted from police disciplinary records. This will influence the amount of time necessary to respond to any modified request. You may be able to limit this delay by “reasonably describing” with appropriate specificity the exact nature of the records you are requesting.



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Finally, the City reserves the right to seek an Advisory Opinion from the Committee on Open Government regarding the scope of the June 9, 2020, changes to the law prior to any final response. A copy of any letter to the Committee on Open Government, if any, will be provided to you without fee. We will also provide a copy of any response they may provide to our inquiry.

Please be further advised that pursuant to Public Officers Law §89(4), all appeals are to be made, in writing, within 30 days of the denial to the Mayor of the City of Binghamton.

B. Request(s) Granted

As to your request that can be reasonably interpreted as a request for use of force records, the City maintains a hard copy responsive record of "use of force applications" for 2015 – present, which contains some of the information you are seeking: for example, badge numbers, date, and type of force. The City can produce the records in their current form, subject to applicable redactions under Public Officers Law, and estimates that the production cost is \$7.50 (a cost of \$0.25 per page, with estimate page count of 30 pages).

The estimated time for production, given the time it will take to redact the documents, limited staffing due to the pandemic, and a high volume of current FOIL requests is 60 days from the date of receipt of payment for production.

Please advise if you would like to move forward with your request in light of the above. Please remit payment in the form of cash, local bank check or money order payable to "City of Binghamton" to the Clerk's Office to begin production. The actual cost, less or more, will be billed upon completion. If the amount is less than \$7.50, the balance will be returned to you. If the balance is more, it will have to be paid before delivery of the documents. Please also provide a mailing address for delivery. Review and production will not begin until payment is received.

Sincerely,

Capt. Sutliff

Administrative/IA Captain – Binghamton Police Department